IN THE SUPREME COURT OF OHIO

No. 29,567

HAROLD KRAMER,

Appellant,

vs.

STATE OF OHIO,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

MOTION TO DISMISS OR AFFIRM.

Now comes appellee, State of Ohio, and moves to dismiss the appeal of appellant, Harold Kramer, or in the alternative, to affirm the judgment herein of the Courts of Ohio, for the reasons set forth in the accompanying memorandum.

FRANK T. CULLITAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

By SAUL S. DANACEAU,
Assistant Prosecuting Attorney,
Attorneys for Appellee.

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MEMORANDUM IN SUPPORT OF STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

History of the Case.

On April 23, 1942, E. H. Sellers, State Inspector for the State Dental Board, made an affidavit before Justice of the Peace Penty in Cleveland charging appellant Harold Kramer with a violation of the state dental laws. Kramer was arraigned April 27th, 1942, and after two or three continuances was eventually tried to a jury in Justice Penty's court and was found guilty. The defendant was fined $200.00 and costs, and after a motion for new trial was filed and overruled, bond was fixed to allow defendant to prosecute error to the Common Pleas Court and a Bill of Exceptions was filed on June 30, 1942. On December 14, 1942 the case was argued before Judge Charles J. McNamee and on

January 18, 1943 Judge McNamee affirmed the judgment without opinion. Notice of appeal was given and on March 29, 1943 the case was argued to the Court of Appeals of Cuyahoga County. On April 19, 1943 the Court of Appeals affirmed the judgment without opinion.

Appellant thereupon on April 28, 1943 filed in the Supreme Court of Ohio a motion for an order to certify the record and also gave notice of appeal to the Supreme Court of Ohio as in a case involving a constitutional question. Thereafter, on June 16, 1943, the said Motion for an Order to Certify the Record was overruled and the said appeal filed as of right was dismissed for the reason that no debatable constitutional question is involved (141 O. S. 667). Appellant filed an application for rehearing and on July 14, 1943, such application for re-hearing was denied.

The Statute.

Section 1329 of the General Code of Ohio, as amended, effective August 21, 1941, reads as follows:

> "Any person shall be regarded as practicing dentistry, within the meaning of this act, who is a manager, proprietor, operator or conductor of a place for performing dental operations or who, for a fee, salary or other reward paid or to be paid either to himself or to another person, performs, or advertises to perform, dental operations of any kind, or who diagnoses or treats diseases or lesions of human teeth or jaws, or attempts to correct malpositions thereof, or who takes impressions of the human teeth or jaws, *or who shall construct, supply, reproduce or repair any prosthetic denture, bridge, artificial restoration, appliance or other structure to be used or worn as a substitute for natural teeth, except upon the order or prescription of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist, or who shall advertise, offer, sell or deliver any such substitute or the services rendered in*

the construction, reproduction, supply or repair thereof to any person other than a licensed dentist, or who places or adjusts such substitute in the oral cavity of another, or who uses the words 'dentist,' 'dental surgeon,' the letters 'D. D. S.,' or other letters or title in connection with his name, which in any way represents him as being engaged in the practice of dentistry.

The term manager, proprietor, operator or conductor as herein used shall be deemed to include any person

1. Who employs licensed operators;

2. Who places in the possession of licensed operators dental offices or dental equipment necessary for the handling of dental offices on the basis of a lease or any other agreement for compensation or profit for the use of such office or equipment; when such compensation is manifestly in excess of the reasonable rental value of such premises and equipment.

"3. Who makes any other arrangements whereby he derives profit, compensation or advantage through retaining the ownership or control of dental offices or necessary dental equipment by making the same available in any manner whatsoever for the use of licensed operators; provided, however, that the above shall not apply to bona fide sales of dental equipment secured by chattel mortgage.

'Whoever having a license to practice dentistry or dental hygiene shall enter the employment of, or shall enter into any of the above described arrangements with, an unlicensed manager, proprietor, operator or conductor may have his license suspended or revoked by the state dental board therefor.' "

(119 v. H. 97; 116 v. 82; 115 v. 68; 111 v. 113; 99 v. 69, § 18. Eff. Aug. 21, 1941.)

An examination of this section in the 1940 Code, reveals that all of the above language which is underlined, was added in the amendment which became effective August 21, 1941. The amendment seeks to regulate dental laboratories and dental repairmen.

The Affidavit.

The affidavit on which the defendant was convicted before Justice of the Peace Myron J. Penty reads as follows:

"THE STATE OF OHIO,
Cuyahoga County, ss:

Warrensville Township.

BEFORE me, M. J. Penty, a Justice of the Peace in and for said County, personally came E. H. Sellers, State Inspector, who being duly sworn according to law, Deposeth and Sayeth, that on or about the 9th day of April, A. D. 1942 at the County of Cuyahoga, one Harold Kramer not being then and there a dentist licensed by the Ohio State Dental Board, did then and there at 112 Prospect Avenue, in the City of Cleveland, County of Cuyahoga and State of Ohio, unlawfully for a fee supply and repair a certain denture for one Ann Wallace, without having first received from a dentist licensed by the Ohio State Dental Board an order or prescription to supply or repair said denture. That further said Harold Kramer unlawfully did advertise, offer, sell or deliver the services rendered in the supply or repair of dental plates to a person or persons other than a licensed dentist. Contrary to the form of statutes in such cases made and provided and against the peace and dignity of the State of Ohio.

E. H. SELLERS.

Sworn to and Subscribed before me this 23rd day of April, A. D. 1942.

M. J. PENTY,
Justice of the Peace."

Section 1329-1 of the General Code of Ohio reads as follows:

"Section 1329-1. (Practice lawful under individual name only; penalty.)

It shall be unlawful for any person or persons to practice or offer to practice dentistry or dental surgery under the name of any company, association, or corporation, and any person or persons practicing or offering to practice dentistry or dental surgery shall do so under his name only and he shall not conduct a dental office in his name nor advertise his name in connection with any dental office or offices unless he is himself personally present in said office operating as a dentist or personally overseeing such operations as are performed in said office or each of said offices during a majority of the time said office or each of said offices is being operated by him; any person convicted of a violation of the provisions of this section shall be fined for the first offense not less than one hundred dollars, nor more than five hundred dollars, and upon a second conviction therefor, his license may be suspended or revoked, as provided in section 1325 of this act."

Facts.

It was conceded in the opening statement of counsel for the defense to the jury in Penty's Court that Kramer was not a licensed dentist. It was further conceded that the defendant Kramer, who operates a business known as the Dental Repair Company, does advertise (R. 27). The state's Exhibit "A" was admitted by defense counsel to be the card of defendant Kramer (R. 33); and state's Exhibit "B" showing an ad in the West Side News was offered (R. 33), and was admitted to be the ad of defendant Kramer (R. 34).

Fred Weigel, the first witness for the state, testified that he was the advertising representative of the West Side News (R. 35); that the paper is published every Thursday with a circulation of 90,000; that Kramer placed an ad in that paper September 11, 1941; and that Kramer made a change in the ad about January 29th (R. 36).

Further, Weigel testified as follows:

"Q. Showing you the West Side News of Thursday, January 29, 1942——

A. If I am not mistaken, that is not the same ad. The first ad ran September 11 and had a different price. I don't recall what it is. I believe Mr. Sellers had a copy of the ad running on September 11, and then two days prior to January 29 Mr. Kramer called me and told me to make a change in the ad, which we subsequently did, and this is the ad (indicating).

Q. And this is the ad?

A. Yes, and that is the ad that has run ever since.

Q. Are these ads run under a contract?

A. Yes, they are.

Q. What are the terms of the contract?

A. I have copies of the contract here." (R. 37 and 38.)

Ann Wallace testified in substance that she was employed by the Better Business Bureau; and that she went to 112 Prospect Avenue to this Dental Clinic on April 9 of this year (R. 42 and 43).

Further, Ann Wallace testified in part as follows:

"Q. Is that the plate you took to Mr. Kramer?

A. Yes, it is.

Q. Before you took that plate to Mr. Kramer, what was wrong with it?

A. There was a tooth out of it.

Q. Can you point to which tooth that was out of there?

A. This one (indicating).

Q. And after you gave this to Mr. Kramer, what did he tell you with reference to this?

A. He told me the charge, and I wanted—when I asked him when I could call for it, he said, 'About four o'clock.'

Q. Did you ask him if he could repair this plate?

A. Yes, I asked if it could be repaired and he said, 'Yes.'

Q. Did you return for it at four o'clock?

A. Yes, I went for it myself.

Q. Is this the plate Mr. Kramer repaired for you (indicating)?

A. Yes, sir.

Q. How much did you say you paid Mr. Kramer?

A. $1.25.

Q. When did you pay that?

A. When I got the teeth." (R. 45.)

Again Ann Wallace testified:

"Q. Now, before you entered Mr. Kramer's office at 112 Prospect Avenue, did you go to a dentist before that?

A. No, I didn't.

Q. You didn't go to a licensed dentist?

A. No, I did not.

Q. And no licensed dentist sent you to see Mr. Kramer?

A. No.

Q. And did Mr. Kramer at the time you went there, did he ask you if you had a prescription from a licensed dentist?

A. No.

Q. Did he refer you to a dentist?

A. No.

Q. And at that time you asked him, you told him that you wanted this plate repaired?

A. Yes, I did.

Q. Now, after you received these plates, or at the time you received them, did Mr. Kramer send you to a dentist?

A. No." (R. 46 and 47.)

Mrs. Phillips Chinn, a housewife whose husband worked for the White Motor Company, testified among other things as follows:

"Q. Did you have any conversation with him at that time about the plate? You asked him to fix your teeth, did you?

A. Yes, if he would fix my tooth.

Q. What did he say as to that?

A. Yes, he would.

Q. Did you agree as to the price?

A. When I came back he charged me $1.25.

Q. He didn't fix your teeth right then?

A. No.

Q. Did he ask you to come back later?

A. Yes, twelve o'clock.

Q. Did you come back at twelve o'clock?

A. Yes.

Q. What happened when you came back at twelve o'clock; you saw him, did you?

A. Yes.

Q. Tell us what happened?

A. All that happened was that it wasn't quite cool and I had to wait until it cooled off, which was a matter of five to ten minutes, because I really was a little earlier and the gentleman came out and handed me my teeth and I went out.

Q. How much did that cost you?

A. $1.25.

Q. Before you went over that day, had you gone to a licensed dentist to have that tooth looked at?

A. No, sir.

Q. When you saw Mr. Kramer there, did he ask you whether or not you had been referred to him by a dentist?

A. No, sir.

Q. Did he ask you whether or not you had a prescription from the dentist?

A. No, sir.

Q. Did he refer you to a dentist before he started working on your plate?

A. No.

Q. He didn't ask anything regarding a dentist at all, did he, during that time?

A. No.

Q. Was that the first time you had been to that place?

A. Yes." (R. 56 and 57.)

Lillian Blaugh, dental assistant, testified that she went to this Dental Plate Repair Company. Miss Blaugh testified:

"Q. Tell us what you did when you went there?

A. Well, I had an upper denture that had one tooth missing and I asked if it could be repaired and the man said, 'Yes' and he told me how much it would be, $1.25, and it would be ready that afternoon at four o'clock.

Q. Did you leave it?

A. I left the denture there.

Q. You left the denture there?

A. Yes.

Q. You came back later, did you?

A. Yes, I did.

Q. What time did you get back?

A. I went back at four o'clock.

Q. Did you pick up this denture?

A. Yes, I did.

Q. Was it repaired?

A. It was repaired.

Q. You paid the price of $1.25, is that correct?

A. That is right.

Q. Now then, do you recall whom you talked to when you went there?

A. I know it was not Mr. Kramer.

Q. You know it wasn't Mr. Kramer.

A. I asked the man if he was the Mr. Kramer on the card and he said, 'No.'

Q. But you knew that it was the place of the man on the card?

A. Yes.

Q. Room 211?

A. Yes.

Q. This man you talked to, that you brought the plate to, did he ask you whether you had a prescription from a dentist?

A. No, he did not.

Q. Did he refer you to a dentist?

A. No, sir, he did not.

Q. Did you have any conversation whatsoever as to a dentist?

A. No, sir.

Q. You simply took your plate in there and had a conversation about what was to be done and it was done?

A. Yes.

Q. Was that the first time that you had been there?

A. Yes, it was." (R. 62 and 63.)

Mrs. Anna Kimmak testified:

"Q. What was wrong with your plate?

A. The plate was cracked.

Q. Where was it cracked?

A. Right in the middle.

Q. When you got there, what did you tell Mr. Kramer that you wanted done with the plate?

A. Just have it fixed.

Q. What did he tell you?

A. He just took it and fixed it.

Q. Did he tell you what time to call for it?

A. I told him, 'When to call for it' and I told him that I wouldn't work on Tuesday or Wednesday—my daughter on the way coming home from work would pass and pick it up.

Q. Did Mr. Kramer tell you how much the plate would be?

A. Yes, he told me five dollars.

Q. How much?

A. Five dollars.

Q. Five dollars?

A. Yes.

Q. You paid Mr. Kramer?

A. Yes, sure I did.

Q. When you went to Mr. Kramer were you sent by a dentist?

A. No, I went there by myself; I was recommended by a friend of mine.

Q. He didn't refer you, when you went there and talked to him, he didn't refer you to a dentist, did he?

A. No." (R. 71 and 72.)

It will be observed from the above testimony that these witnesses went directly to Kramer's Plate Repair Company, and that they had no connection with any licensed dentist in connection with the replacing of teeth and the repair of dentures. No licensed dentist had anything to do with the repairs or adjustment of the dentures either before or after defendant Kramer did his work.

It thus appears that the defendant was charged with a misdemeanor as described in Sections 1329 and 1329-1 of the General Code of Ohio. A warrant was issued in pursuance to the affidavit hereinbefore set forth and the defendant was arraigned on April 27, 1942. A demurrer filed by defendant was overruled and on May 15, 1942, defendant entered a plea of "not guilty" and demanded a Jury. On May 28, 1942, the defendant was given leave to withdraw his plea of "not guilty" and further hearing on the demurrer was had, and the demurrer was overruled. On May 28, 1942, the parties being present the trial was duly had. The defendant, Harold Kramer, entered a plea of "not guilty" and a Jury, after being duly impaneled and sworn to try said defendant, found the said defendant guilty.

Argument.

The record discloses affirmatively that the defendant, Harold Kramer, was accorded due process of law.

Appellant contends that the regulatory provisions of the General Code of Ohio pertaining to the practice of dentistry will result in increased prices being paid by patients with a resulting benefit to the licensed dentists and that such legislation works a hardship both on those who are not licensed dentists and on the public. Such arguments may well be addressed to the State Legislature but they can hardly form the basis of a real and substantial federal constitutional question.

The law is established beyond dispute that it is within the legitimate exercise of the police power of the State to

regulate in the public interest the practice of the profession of dentistry within the State. (*Douglas* v. *Noble*, 261 U. S. 165; *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608.)

It necessarily follows that it is within the legitimate exercise of the police power of the State to define within reasonable limits what constitutes the practice of dentistry. This is precisely what the legislature of the State of Ohio has done. The defendant, Harold Kramer, is admittedly not a licensed dentist and the record clearly discloses that he violated the provisions of Sections 1329 and 1329-1 of the General Code of Ohio, which provides that certain work relating to the reproducing or repair of bridges, appliances, etc., may not be done "except upon the order or prescription of a licensed dentist and constructed upon or by the use of casts or models made from an impression taken by a licensed dentist, etc." This amendment allows one skilled in making or repairing dentures to work with and for dentists. It seeks to prohibit advertising by a repair man and the repair of dentures and the replacing of teeth without a dentist having some supervision and direction over the work to be done. The close relationship between good teeth and good health is self-evident. It will be readily seen that if the contention of the appellant is correct then any blacksmith in the State of Ohio who possesses the requisite skill can replace teeth in dentures and can repair dentures without any license and without any supervision or control. On the other hand, if appellant Kramer has the skill and ability which is claimed in this case, he undoubtedly would have plenty of work sent to him by the licensed dentists.

In *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, 611, Mr. Chief Justice Hughes delivered the opinion of the Court, wherein he said:

"That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. Douglas *v.* Noble, 261 U. S. 165, 67 L. ed. 590, 43 S. Ct. 303; Graves *v.* Minnesota, 272 U. S. 425, 427, 71 L. ed. 331, 334, 47 S. Ct. 122. The State may thus afford protection against ignorance, incapacity and imposition. Dent *v.* West Virginia, 129 U. S. 114, 122, 32 L. ed. 623, 626, 9 S. Ct. 231; Graves *v.* Minnesota, *supra*. We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals (State Dental Examiners *v.* Miller, 90 Colo. 193, 8 P. (2d) 699, 287 U. S. 563, 77 L. ed. 496, 53 S. Ct. 6), and that it may prohibit advertising that tends to mislead the public in this respect. Dr. Bloom Dentist *v.* Cruise, 259 N. Y. 358, 363, 182 N. E. 16, 288 U. S. 588, 77 L. ed. 967, 53 S. Ct. 320."

And on page 612:

"We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief."

And on page 613:

"The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though in particular instances there might be no actual deception or misstatement."

Appellant claims that the regulatory act is unconstitutional in that it violates the provisions of the fifth amendment and of Section 1 of the fourteenth amendment to the Constitution of the United States. The Supreme Court of the United States has already decided that such regulatory provisions are not in violation of the Federal Constitution and the record discloses on its face that the defendant has been accorded due process of law.

As to the claimed violations of the State Constitution, the State courts have ruled that there is no such violation and, certainly, such claims produce no Federal constitutional question.

The Supreme Court of Ohio has held that there is no debatable constitutional question involved herein and it is evident that the questions presented by appellant are so unsubstantial as not to need further argument and that it is manifest that the appeal was taken for delay only.

It might be well to further point out that the Supreme Court of Ohio did not, as appellant suggests in his statement, make any specific rulings on any of the questions presented. It merely denied the motion to certify and dismissed the appeal as of right for the reason that no debatable constitutional question is involved.

Respectfully submitted,

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